FILED
JAN 28 1988
JOSEPH F. SPANIOL, JR.
CLERK

87-1263

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CATALINO LASTIMOSA,
Petitioner,
vs.

HUGHES AIRCRAFT COMPANY
and JACK CURTIS,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

FRED L. WRIGHT
Attorney at Law
Suite D
1515 Crenshaw Boulevard
Torrance, California 90501
(213) 533-5965
Attorney for Petitioner

Lawyers Brief Service / Legal Publishers / (213) 383-4457 / (714) 720-1510

QUESTIONS PRESENTED

In the matter at issue, the Ninth Circuit Panel refused to consider this Court's decision in Caterpillar, Inc. v. Williams (1987) 482 U.S.--, 96 L.Ed.2d 318, 107 S.Ct.--, another Ninth Circuit Panel decision, Paige v. Henry J. Kaiser Co., (9th Cir., 1986) 826 F.2d 857, or other generally applicable principles of Federal Pre-emption, in holding that petitioner's claims for damages based on respondents' violation of the California Occupational and Health Safety Act were completely pre-empted by Section 301 of the Labor Management Relations Act because petitioner may have also had claims under his CBA. In light of this holding, the questions presented here are:

1. Whether claims for damages, based on a violation of California statutes, man-

dating Occupational Health and Safety, are pre-empted by Section 301 of the Labor Management Relations Act, where a labor contract also contains health and safety regulations.

2. If a federal court accepts jurisdiction on the basis of the well-plead complaint rule, is it required to give the plaintiff leave to amend before dismissing his case on the basis that the implied claim, in fact, was not plead?

LIST OF PARTIES

The parties to the proceeding below were the Petitioner, **Catalino Lastimosa, and the Respondents, Hughes Aircraft Company and Jack Curtis.**

TABLE OF CONTENTS

QUESTIONS PRESENTED..... (i)

LIST OF PARTIES..... (ii)

PETITION FOR WRIT OF CERTIORARI..... 1

OPINIONS BELOW..... 1

JURISDICTION..... 2

STATUTES INVOLVED..... 3

STATEMENT OF THE CASE..... 4

REASONS FOR GRANTING THE WRIT..... 14

1. Lastimosa, as Master of His Complaint, Was Free to Ignore Any Federal Remedy He May Have Had Under the CBA, and Bring His Claim Based on State Law.. 14

2. If Latimosa Was Required to Bring a Section 301 Claim as Opposed to His State Law Claims, the Ninth Circuit Court of Appeals Erred By Not Allowing Him to Assert That Federal Claim..... 21

CONCLUSION..... 25

APPENDIX A

Memorandum Decision of Ninth Circuit Court of Appeals, FILED July 22, 1987..... A-1

Order Modifying Memorandum Decision Judgment, Filed October 30, 1987..... A-9

TABLE OF CONTENTS, CONTINUED

Findings of Fact and Conclusions of Law of District Court, Filed April 16, 1986..... A-11

Judgment of Ninth Circuit Court of Appeals, Filed November 13, 1987..... A-21

APPENDIX B

Portions of California Occupational Safety and Health Act of 1977..... B-1

TABLE OF AUTHORITIES

Caterpillar v. Williams (1987)
482 U.S.--, 96 L.Ed.2d 318,
107 S.Ct.--..... 12,13
14,20,21
26,

Comby v. Shell Oil Co. (1980, 5th Cir.)
615 F.2d 698..... 24

Foman v. Davis (1962)
371 U.S.178, 9 L.Ed.2d 222,
83 S.Ct. 227..... 25

Hentzel v. Singer Co. (1982)
138 Cal.App.3d 290, 301..... 18

Paige v. Kaiser Co. (9th Cir., 1986)
826 F.2d 857..... 13,
14,20,
21,

Tameny v. Atlantic Richfield Co.
(1980) 27 Cal.3d 167..... 17

United Airlines v. Occupational
Health and Safety Appeals Board
(1982) 32 Cal.3d 762..... 18

Vaca v. Sipes (1967)
386 U.S. 171, 179..... 17

STATUTES

Section 301, Labor Management
Relations Act..... 3,4
10,11,
15,16,
20,21,
22,

TABLE OF AUTHORITIES, CONTINUED

28 U.S.C. §1254(1)..... 3

29 U.S.C.§1441..... 2,8

29 U.S.C.§667(c)..... 18,25

California Labor Code Sections 6300, 6310, 6311..... 3,8 18,19

Federal Rule of Civil Procedure 15(a)..... 23

IN THE

SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1987

CATALINO LASTIMOSA,

Petitioner,

vs.

HUGHES AIRCRAFT COMPANY
and JACK CURTIS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI

The Petitioner, CATALINO LASTIMOSA, respectfully prays that a Writ of Certiorari issue to review the judgment and modified opinion of the United States Court of Appeals, for the Ninth Circuit, entered in the above-entitled proceeding on November 13, 1987.

OPINIONS BELOW.

The unmodified opinion of the United States

Court of Appeals for the Ninth Circuit is not reported and was originally filed July 22, 1987. It is reprinted herein in the Appendix to this Petition at pages A1 through A8 . The Court of Appeals order modifying its opinion and denying rehearing and rehearing en banc is not reported. It is reprinted in the Appendix to this Petition at pages A9 through A10. The decision of the District Court has not been reported. It is reprinted in the Appendix to this Petition at pages A11 through A20 .

JURISDICTION

Petitioner originally brought this action in the Superior Court of California, County of Los Angeles. Respondents removed the action to the United States District Court, Central District of California, alleging federal jurisdiction under 28 U.S.C.§1141.

Thereafter, respondents moved for summary judgment, contending petitioner's claims were preempted by Section 301 of the Labor Management Relations Act. The motion was granted on April 16, 1986. By decision filed July 22, 1987, the Court of Appeal affirmed the District Court's decision and, in an order filed October 30, 1987, modified its earlier opinion and denied Catalina Lastimosa's Motion for Rehearing or Rehearing En Banc. Judgment was entered on November 13, 1987. Catalina Lastimosa invokes the jurisdiction of this Court pursuant to 28 U.S.C.§1254(1).

STATUTES INVOLVED

This case involved the relationship of the California Occupational Health and Safety Act (Cal-OSHA), California Labor Code Sections 6300, et. seq., most specifically, Sections 6310 and 6311, and Section 301 of the Labor Management

Relations Act. Relevant portions of Cal-OSHA are reprinted in Appendix "B", along with Section 301 of the Labor Management Relations Act.

STATEMENT OF THE CASE

Petitioner, Catalino Lastimosa ("Lastimosa") was an employee of Respondent Hughes Aircraft Company ("Hughes"), at its Torrance, California, 1/ facility. From November, 1982, to approximately June 28, 1984, he was employed as a furnace operator in the furnace room.

Lastimosa worked with gas furnaces used to braze electronic circuits. The external surfaces of the furnaces were wrapped in asbestos. During the time Lastimosa worked in the furnace room,

---

1/ The facts set forth in the instant petition are supported by the excerpts of record submitted in Lastimosa v. Hughes, et al., District Court Case No. 85-2780, Court of Appeals Case No. 86-5899.

large amounts of dust during the brazing process. The dust and abestos caused Lastimosa respiratory problems.

Beginning in March, 1984, Lastimosa requested Hughes' approval to wear a paper dust mask when he was working in the furnace room. Hughes issued the mask to Lastimosa, which he wore without incident until May 30, 1984. On that date and in response to the complaints made by Lastimosa, Cal-Osha inspectors conducted an inspection of the furnace room at the Hughes facility. On June 12, 1984, Hughes, without regard to the fact that use of the mask was improving Lastimosa's respiratory problems, informed Lastimosa that he would no longer be permitted to wear the dust mask while working.

At all relevant times, Lastimosa was a member of the Electronic and Space Technician's Local 1553 of the AFL-CIO

(the "Union"). Through collective bargaining, the Union and Hughes had entered into a contract governing terms and conditions of Lastimosa's employment at Hughes. That contract required Hughes to provide its employees a safe place to work and required all employees to wear all issued safety devices. It also provided that no employee could be terminated without cause and set forth a grievance mechanism for dispute resolution. The final step in the grievance procedure was arbitration, which the Union was required to initiate.

Initially, in response to Hughes' order, Lastimosa stopped wearing the paper mask and filed a grievance, asserting that he was required and authorized to wear the paper mask under the CBA.

While his grievance was pending, and

on June 22, 1984, Hughes began replacing the abestos on the furnaces with new abestos, thereby increasing the risk of asbestos exposure. Lastimosa refused to work without the paper mask and was removed from the premises. Hughes notifed Lastimosa by letter that unless he returned to work on June 28, 1984, and agreed to work without the dust mask, he would be terminated. Lastimosa refused to agree to work without the mask and was terminated by Hughes on June 28, 1984. In October, 1984, Lastimosa's grievance was denied and his Union refused to take the matter to arbitration.

Lastimosa dropped his CBA claims and on February 22, 1985, filed this action in the Superior Court of California, County of Los Angeles. He sought damages from respondents, contending his termination violated California Labor Code

Sections 6310 and 6311, which make it unlawful for an employer to terminate an employee for filing a complaint with Cal-OSHA or for refusing to work in an unsafe work environment. He claimed both the lost wages authorized by statute and tort damages under the wrongful discharge theory recognized by the California Supreme Court in Tameny v. Atlantic Richfield Co. (1980) 27 Cal.3d 167.

Respondents Hughes and Curtis were served with the summons and complaint and immediately removed the action to federal court, claiming federal jurisdiction under 29 U.S.C.§1441. Respondents asserted that the action arose under the laws of the United States because Lastimosa's claims, although framed under state law, were required to be brought under Section 301 of the Labor Management Relations Act.

After discovery, and on February 20, 1986, respondents moved for summary judgment, again contending that petitioner's claims were required to be brought under the CBA; that said agreement required arbitration, which the Union refused to process in petitioner's case, and therefore, that the case should be dismissed because it did not allege a breach of the Union's duty of fair representation.

Lastimosa opposed the motion, contending that the district court did not have jurisdiction to hear his claims because they were based entirely on state law and that the case should therefore be remanded to state court. The district court found that the California Labor Code statutes at issue directly impacted upon the employment relationship by directing the duties of employers with

respect to Occupational Health and Safety. It concluded that enforcing these statutes by way of a wrongful discharge suit would clearly interfere with the collective bargaining system and federal labor process. Therefore, the district court ruled that federal labor law preempted and prohibited the maintenance of both the statutory and public policy wrongful discharge claims made by Lastimosa. The court went on to dismiss the action because Lastimosa had not alleged that his Union breached its duty of fair representation in failing to take his CBA claims to arbitration.

Lastimosa appealed the decision to the Ninth Circuit Court of Appeals. He argued that the district court erred in not allowing him to be the master of his complaint and in finding that his state law claims were preempted by Section 301

of the Labor Management Relations Act; because Congress intended state regulation of Occupational Health and Safety and the laws at issue were separate from any claims he may have had under the CBA. He also argued that it was error for the district court to imply petitioner a remedy under the CBA to exercise jurisdiction over his claims by virtue of the well-plead complaint rule, and then to dismiss the complaint without allowing him to assert such federal claims.

The Ninth Circuit Court of Appeals held that the statutes at issue were not directed at the general public, and the policies represented by the state causes of action were not independent of the employment relation. It found that the CBA provided Lastimosa no less protection than the statutes on which he relied, and held that to uphold the state cause of

action would undermine federal labor policies favoring uniform interpretation of collective bargaining agreements and the exclusivity of union-employer grievance procedures. Accordingly, it also ruled that Lastimosa's state law claims were completely preempted by the Labor Management Relations Act. It also refused to find that the district court erred in not allowing petitioner leave to state a claim to also assert that his Union violated its duty of fair representation for not taking his claims to arbitration.

After the matter was submitted for consideration, this court decided Caterpillar v. Williams (1987) 482 U.S.--, 96 L.Ed.2d 318, 107 S.Ct.--, wherein it recognized that an employee covered by a CBA may nonetheless have legal rights arising from the employment

relationship that exist independent of the CBA, and because the employee is the master of his complaint, he may assert those independent rights in the state court if he chooses. Similarly, after the decision, another panel of the Ninth Circuit Court of Appeals decided the case of Paige v. Henry J. Kaiser Company, 826 F.2d 857 (9th Cir., 1987), holding that a claim for a wrongful termination, based on California's public policy as expressed in Cal-OSHA, was not preempted by Section 301 of the Labor Management Relations Act, or the National Labor Relations Act.

Lastimosa timely petitioned the Ninth Circuit Panel which decided this case for a rehearing to reconsider in light of Caterpillar, Paige, and well established federal law concerning preemption. The Panel unanimously refused to rehear or

otherwise reconsider in light of the above-cited cases.

WHEREFORE, it is respectfully requested that this Court grant the writ of certiorari and order the Ninth Circuit to reconsider in light of the Caterpillar and Paige decisions, or otherwise consider the matter in the first instance.

REASONS FOR GRANTING THE WRIT

1. Lastimosa, As Master of His Complaint, Was Free to Ignore Any Federal Remedy He May Have Had Under The CBA, and Bring His Claim Based on State Law.

Only a few months ago, this Court in Caterpillar v. Williams, (1987) 482 U.S.--, 96 L.Ed.2d 318, 107 S.Ct.--, recognized that it is the plaintiff who is the master of his complaint and chooses on which theories he will proceed. The issue in Caterpillar was

whether an employee's state law claim for breach of an individual employment contract was completely preempted by Section 301 of the Labor Management Relations Act of 1947 (and the case therefore removable to federal court) because the employee was also governed by a CBA. In holding that it was not, this Court reasoned that an employee covered by a CBA may nonetheless have legal rights arising from the employment relationship that exist independent of the CBA, including state law contract rights, and because the employee is "the master of his complaint", he may assert those independent rights in state court if he so chooses:

> "Section 301 does not, as Caterpillar suggests, require that all employment-related matters involving unionized employees be resolved through collective bargaining and thus be governed by a federal common

law created by Section 301.

> The Court has stated that not every dispute concerning employment or tangentially involving the provision of a collective bargaining agreement, is preempted by 301 or other provisions of Federal Labor Law. (Citations) Claims bearing no relationship to a collective bargaining agreement beyond the fact that they are asserted by an individual covered by such an agreement are simply not preempted by Section 301. (Citation)." Id. 96 L.Ed.2d at 330 Fn. 10.

The graveman of petitioner's state court complaint in this action was that he was fired by HUGHES because either he filed a complaint with the California Labor Board asserting that unsafe labor conditions existed at his jobsite; or for demanding his employer allow him to wear safety equipment necessary to make his workplace safe - retaliatory terminations specifically prohibited by California Labor Code Sections 6310 and 6311.

The rights afforded petitioner under Cal-OSHA, and in particular, the right protecting him from retaliatory termination, are rights afforded every employee in the State of California and are rights which exist independent of any CBA to which an employee may be a party. Similarly, the right of petitioner not to be terminated for reasons which contravene public policy (Tameny v. Atlantic Richfield Co. [1980] 27 Cal.3d 167) is an action in tort and separate from the employment contract.

Under no circumstances could the Ninth Circuit properly find preemption because the termination may also have violated the CBA. In Vaca v. Sipes(1967) 386 U.S.171, 179, this Court recognized that the doctrine of preemption has absolutely no application where it cannot be fairly inferred from the

activities of Congress that it intended exclusive jurisdiction to lie in federal courts. Concerning matters of Occupational Health and Safety, the Congress of these United States has specifically allowed states to assume responsibility for the development and enforcement of standards pursuant to a plan approved by the Secretary of Labor. (29 U.S.C.§667[c]; Hentzel v. Singer Co. [1982] 138 Cal.App.3d 290, 301.) California adopted Cal-OSHA (Labor Code Sections 6300, et seq.) in response to the invitation of the Congress that states assume jurisdiction in matters of occupational health and safety. When California complied with 29 U.S.C.§667, federal preemption was removed so that California could exercise its sovereign powers over occupational safety. United Airlines v. Occupational Safety and

Health Appeals Board (1982) 32 Cal.3d 762.

Therefore, the fact that petitioner may have had similar rights under the CBA, which, pursuant to the terms of that agreement, would have resulted in arbitration if the Union so desired to proceed, is not dispositive. The test is not whether or not the state statutes at issue are independent of the employment relationship, as the Ninth Circuit erroneously concluded, but whether the state right sought to be asserted is independent of the CBA.

By choosing to exercise jurisdiction over Occupational Health and Safety, and by creating standards, penalties and remedies for the violation of such standards, California has provided to its citizens rights independent of any CBA. See California Labor Code Section 6300.

In this case, Lastimosa sought to assert those independent state law rights but the Ninth Circuit erroneously concluded that he must rely solely on the CBA. But as this Court noted in Caterpillar, supra, the fact that plaintiff may have also had substantial rights under the CBA and could have brought suit under Section 301, is not dispositive, for as master of his complaint, he was not required to do so.

Indeed, in a case decided by a different panel of the Ninth Circuit Court of Appeals after the rendition of this case, the court specifically held that claims for wrongful termination based on an employer's termination in violation of OSHA are not preempted by Section 301 of the Labor Management Relations Act. Paige v. Henry J. Kaiser Co. 826 F.2d 857 (9th Cir., 1987).

This case is not distinguishable from Paige and therefore an inconcistency of decision on the issue exists within the Ninth Circuit. But since the decision in Paige is consistent with the Caterpillar decision, and this case is not, it is respectfully requested that this Court issue certiorari and order the Ninth Circuit to reconsider this matter on the basis of Caterpillar and Paige, or decide the matter in the first instance.

2. **If Lastimosa Was Required to Bring a Section 301 Claim as Opposed to His State Law Claims, the Ninth Circuit Court of Appeals Erred By Not Allowing Him to Assert That Federal Claim.**

As set forth early in this Petition, Lastimosa initially filed this case in state court seeking damages on purely state law theories. The respondents

removed the action to federal court, contending that as petitioner had a potential remedy under his CBA, the state law claims were completely preempted by Section 301 of the Labor Management Relations Act. The district court accepted jurisdiction on the basis of the artful pleading and well-plead complaint rules, finding that a properly plead complaint would have contained a cause of action based on Section 301 of the Labor Management Relations Act.

Throughout the proceedings, Lastimosa contended that he was not making any CBA claims, and wanted to rely solely on his state law claims. However, he requested that if the court found he was required to bring claims based on Section 301, that it allow him to proceed on such a claim.

After finding that Section 301 of the

Labor Management Relations Act preempted his state law claims, the district court dismissed the case because the complaint did not contain any allegation that the Union breached its duty of fair representation by failing to take the matter to arbitration. In so ruling, the district court did not specify any reason for not allowing petitioner to proceed on the implied 301 claim.

Federal Rule of Civil Procedure 15(a) states that leave to amend the complaint shall be freely given when justice so requires. Since the court implied a 301 claim to accept jurisdiction, justice required that at a miminum, petitioner be given the right to prosecute the implied claim.

It has always been recognized that controversy should be decided on the merits whenever practical, and therefore,

amendments should be liberally allowed. Comby v. Shell Oil Co. (1980 Court of Appeal 5th) 615 F.2d 698.

In its Opinion affirming the district court decision, the Court of Appeal did not discuss the district court's refusal to allow Lastimosa to proceed on a 301 claim. In response to Lastimosa's request for rehearing on that issue, the court simply modified the language of its Opinion, stating: "The district court did not err by failing to imply an amendment of plaintiff's complaint, to include a claim of the breach of the duty of fair representation." In short, neither the Court of Appeal nor the district court, gave any justifiable reason for not allowing petitioner to proceed on the federal claim which it had determined to be his remedy. Such a ruling is not an exercise of discretion, but an abuse of

discretion which is inconsistent with the spirit of the Federal Rules of Civil Procedure. Foman v. Davis (1962) 371 U.S. 178, 9 L.Ed. 2d 222, 83 S.Ct. 227.

Therefore, it is respectfully requested that this court issue a writ of certiorari ordering the Ninth Circuit to reconsider in light of the foregoing decisions, or alternatively explain why petitioner is not entitled to prosecute the federal claim which the court implied was his remedy.

CONCLUSION

Petitioner respectfully submits that Congress intended that the States exercise their sovereign jurisdiction over Occupational Health and Safety. Once California complied with the prerequisites of 29 U.S.C.§667 and created statutory Occupational Health and Safety law, it provided California citizens new

rights and remedies independent of any collective bargaining agreement. Petitioner, as master of his complaint, was entitled to bring his Occupational Health and Safety claims under state law and ignore any claims he may have had under a collective bargaining agreement. Since the Ninth Circuit, in reaching a contrary conclusion did not follow the recent decision of this Court in Caterpillar v. Williams, or the decision of another Panel of the Ninth Circuit in Paige v. Henry J. Kaiser Co., it is respectfully requested that this Court issue the Writ and order the Ninth Circuit to reconsider in view of those cases.

Alternatively, the irreconciliable disagreement between the courts on the preemption issue reflects the need for resolution of these issues by this

Honorable Court, and it is therefore alternatively requested that this Court hear the matter in the first instance.

DATED: January 28, 1988 Respectfully Submitted

FRED L. WRIGHT

APPENDIX A

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CATALINO LASTIMOS, Plaintiff-Appellant,	)	CA NO. 86-5899 DC NO. 85-2780-RG
v	)	MEMORANDUM
HUGHES AIRCRAFT COMPANY, JACK CURTIS, Defendants-Appellees.	)	Filed July 22, 1987 Cathy A. Catterson, Clerk

Appeal from the United States District Court for the Central District of California

Honorable Richard A. Gadbois, District Judge, Presiding

Argued and Submitted December 2, 1986 Pasadena, CA

BEFORE: ANDERSON, TANG** AND CANBY CIRCUIT JUDGES.

Catalino Lastimosa appeals the District Court's grant of removal under the artful

pleading doctrine and subsequent dismissal of his wrongful discharge claim against Hughes Aircraft. We Affirm.

I.

We review the district court's ruling on removal jurisdiction de novo. Bright v. Bechtel Petroleum, Inc., 780 F.2d 766, 768 (9th Cir.1986).

---

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Cir. R.21.

** Following the death of Judge Solomon, Judge Tang was randomly selected to replace him.

Hughes allegedly fired appellant in violation of company safety rules which were incorporated into the union's collective bargaining agreement. Before bringing his state court action, Lastimosa challenged the discharge

through the labor contract's grievance process. The district court properly looked beyond the face of Lastimosa's state-court complaint to determine that the discharge involved his assertion of rights under the collective bargaining agreement. See, e.g., Williams v. Caterpillar Tractor Co., 786 F.2d 928,931 N.1 (9th Cir. 1986), affirmed, 55 U.S.L.W. 4804 (Jun. 9, 1987); Bright, 780 F.2d at 769; Olguin v. Inspiration Consolidated Copper Co. 740 F.2d 1468, 1472-75 (9th Cir. 1984); Fristoe v. Reynolds Metals Co., 615 F.2d 1209, 1212 (9th Cir. 1980).

Although framed as a state-law tort and contract action, plaintiff's claim is actually grounded in the collective bargaining agreement. See Olguin, 740 F.2d 1468. Appellant's rights in his state wrongful discharge action substan-

tially depend on analysis of the terms of the labor contract and "resolution of ... federal question(s) must play a significant role in the proceedings." Williams, 786 F.2d at 931 (quoting Hunter v. United Van Lines, 746 F.2d 635, 646 (9th Cir. 1984), cert. denied, 106 S. Ct. 180 (1985)); see International Brotherhood of Electrical Workers v. Hechler, 55 U.S.L.W. 4694, 4696 (May 26, 1987); Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 218 (1985).

The California Labor Code Sections relied on by Lastimosa establish the duties of employers and provide remedies for their violation. The statutes are not directed at the general public and the policies represented by the state cause of action are not independent of the employment relation. E.G., Garibaldi v. Lucky Food Stores, Inc., 726 F.2s

1367, 1373-75 (9th Cir. 1984), cert. denied, 105 S.Ct. 2319 (1985); Friday v. Hughes Aircraft Co., 188 Cal.App.3d 117, 123-24, 225 Cal.Rptr. 89, 93-94 (Cal.Ct. App. 1986), appeal dismissed as improvidently granted, 236 Cal.Rptr. 290, 735 P.2d 117 (Cal.1987) (distinguishing Garibaldi). The labor contract provided Lastimosa no less protection than the statutes he seeks to rely upon to maintain his state cause of action. Id.; see Harper v. San Diego Transit Corp., 764 F.2d 663, 668-69 (9th Cir. 1985); Costello v. United Parcel Service, Inc., 617 F.Supp. 123, 124-25 (D.C. Pa. 1984) (interpreting Ninth Circuit Garibaldi and Olguin cases, court finds §301 of the Labor Management Relations Act vindicates same interests as state wrongful discharge action based on retaliation for filing workers compensation claim) aff'd

without published opinion, 774 F.2d 1150 (3d Cir.1985). To uphold plaintiff's state cause of action would undermine federal labor policies favoring uniform interpretation of collective bargaining agreements and exclusivity of union-employer grievance procedures. Hechler, supra; Allis-Chalmers, 471 S.Ct. at 216-18. The wrongful discharge claim is completely preempted by the Labor Management Relations Act. See Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1, 23-24 (1983); Carter v. Smith Food King, 765 F.2d 916, 921 (9th Cir. 1985).

Thus, the district court correctly characterized the claim as an action for violation of labor contract under §301 of the Labor Management Relations Act. 29 U.S.C.§185. Section 301 claims are within the concurrent jurisdicton of

state and federal courts. Charles Dowd Box Co. v Courtney, 368 U.S. 502 (1968). Removal jurisdiction was appropriate. 28 U.S.C.§1441(a).

II.

In the district court, Lastimosa did not claim that the union breached its duty of fair representation, as he now contends on appeal. Although plaintiff earlier lodged formal charges of union discrimination with the National Labor Relations Board, in the district court he asserted that "no breach of the duty of fair representation is alleged." Opposition to Motion for Summary Judgment at 10. The district court did not err by refusing to find a breach of fair representation on plaintiff's behalf.

Without alleging that the union breached its duty of fair representation, Lastimosa's sole remedies were through

the arbitration and grievance procedures in the labor contract. Vaca v. Sipes, 386 U.S. 171, 184 (1967); Olguin, 740 F.d 1472 (citating Republic Steel Co. v Maddox, 379 U.S. 650 (1965)); see also Fountain v. Safeway Stores, Inc., 555 F.2d 753, 756 n.2 (9th Cir. 1977). In light of his unsuccessful grievance, the union's decision not to arbitrate, and the federal policy of finality in labor arbitration, the district court properly dismissed Lastimosa's action.

The district court's decision upholding jurisdiction under §1441(a) and dismissing appellant's action is **AFFIRMED.**

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CATALINO LASTIMOS,	)	CA NO. 86-5899
	)	DC NO. 85-2780RG
Plaintiff-Appellant,	)	
	)	
v	)	
	)	ORDER
HUGHES AIRCRAFT COMPANY,	)	FILED
JACK CURTIS,	)	October 30,1987
	)	Cathy A. Cat-
Defendants-Appellees.	)	terson, Clerk
	)	U.S. Court of
	)	Appeals

BEFORE: ANDERSON, TANG & CANBY, CIRCUIT JUDGE

The memorandum disposition previously filed in this case is amended as follows:

The last sentence in the first paragraph of Section II of the memorandum is deleted and the following is substituted therefor:

"The district court did not err by failing to imply an amendment of plaintiff's complaint, to include a claim of breach of the duty of fair representation."

The panel has voted unanimously to deny the petition for rehearing and suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote to rehear the matter en banc.

The petition for rehearing is hereby denied and the suggested for rehearing en banc is rejected.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CATALINO LASTIMOSA, Plaintiff, vs. HUGHES AIRCRAFT COMPANY, a corporation; JACK CURTIS, DOES I through 50, Inclusive, Defendants.	) Filed Apr. 16, 1986 Clerk, U.S. District Court) CASE NO. CV 85-2780-SVW) FINDINGS OF FACT AND CONCLUSIONS OF LAW

Defendants Hughes Aircraft Company's and John J. Curtis' motion for summary judgment came on regularly for hearing on March 24, 1986 before the Honorable Stephen V. Wilson, District Judge. Upon consideration of the oral arguments of counsel and the papers filed herein, the Court granted defendants' motion on the ground that plaintiff's wrongful discharge claim is preempted by federal labor law and his sole remedy is under

the collective bargaining agreement.

Plaintiff Lastimosa wsa an employee of Hughes Aircraft Company ("Hughes") covered by the terms of a collective bargaining agreement (CBA) between Hughes and Electronic and Space Technicians, Local 1553 of the AFL-CIO. Lastimosa was discharged after he refused to work without a mask due to his concern about the presence of abestos in his working environment. Hughes insisted that Lasimosa work without the mask after an internal investigation and an investigation by Cal-OSHA, both prompted by Lastimosa's complaints, indicated there was no significant abestos danger.

Subsequent to his discharge, Lastimosa pursued a grievance against the company according to the grievance mechanisms established by the CBA, and also filed an unfair labor practice charge

with the National Labor Relations Board. After losing in both forums, Lastimosa brought the current action for wrongful discharge under California law.

In opposing this motion, Lastimosa first argues that the case was removed improperly to federal court. The complaint here does not refer to the union or the collective bargaining agreement but does state that plaintiff was discharged without good cause and in violation of the company's written safety rules. Deposition testimony makes clear that plaintiff's claim in reality is essentially that he was discharged in violation of the provisions of the CBA pertaining to safety and discharge.

Under the doctrine of "artful pleading", removal is proper where the actual facts underlying the complaint indicate that plaintiff actually must

rely on federal law and a federal remedy to state a claim. A court is permitted to look at facts outside of the complaint to support removal. Olguin v. Inspiration Consolidated Copper, 740 F.2d 1468, 72-73 (9th C. 1984). Here, although Lastimosa avoided reference to the CBA in his complaint, the surrounding facts do indicate that the complaint is making a claim for breach of the CBA arising under federal labor law. Thus, removal was proper.

Under California law, Lastimosa's wrongful discharge claim can assert any of three theories: (1) breach of an implied-in-fact promise not to discharge without good cause, Pugh v. See's Candies, Inc., 116 Cal.App.3d 311 (1981); (2) breach of the covenant of good faith and fair dealing, Cleary v. American Airlines, Inc. 111 Cal.App.3d 443 (1980);

and (3) discharge in violation of public policy, Tameny v. Atlantic Richfield Co. 27 Cal.3d 167 (1980).

There appears to be no dispute that a wrongful discharge action based on the first and second of these theories clearly is preempted by federal labor law, specifically §301 of the Labor-Management Relations Act. Olguin, supra; Buscemi v. McDonnell Douglas Corp. 736 F.2d 1348 (9th Cir. 1984); Firstoe v. Reynolds Metal Co., 615 F.2d 1209 (9th Cir. 1980). Where an employee is covered by a CBA, state contract actions and actions for tortious breach of contract are preempted because the entire contractual relationship is contained in the CBA and federal labor law governs all aspects of the collective bargaining relations.

The Court further finds that Lastimosa's public policy claim also is

preempted. Lastimosa contends that he was discharged for complaining about safety conditions and filing a complaint with Cal-OSHA. He argues that his discharge was in violation of the public policy expressed in Cal. Labor Code §6400, which requires an employer to maintain a safe working place, and Labor Code §6310, which prohibits the discharge of an employee due his making safety complaints.

In Garibaldi v. Lucky Food Stores, 726 F.2d 1367, (9th Cir. 1984), the Court found that a wrongful termination action based on public policy was not preempted where the state statute was important for general public health and safety and did not pose any significant threat to the collective bargaining process. Whether the current action can avoid preempted thus depends on whether:

(a) the statutes cited advance a state interest in protecting the general public, an interest which is "extrinsic to" or which "transcends" the employment relationship; See, Olguin, supra, and Garibaldi, supra; and

(b) the exercise of state authority does not frustrate effective implementation of federal labor processes or interfere with or regulate the collective bargaining process. See New York Telephone v. New York State Dept. of Labor, 440 U.S. 519, 99 S.Ct. 1328 (1979); Garibaldi, supra.

With respect to the first element, the statutes here are not extrinsic to the employment relationship. Rather, they directly address and impact upon the employment relationship by directing the duties of employers and providing remedies for violations. Unlike the statute

in Garibaldi, the statutes here are not directed at the general public or some non-employment-related problem.

With respect to the second element, enforcing these statutes by way of a wrongful discharge suit would clearly interfere with the collective bargaining system and federal labor processes. The CBA here specifically dealt with the safety responsibilities of management and the procedure for handling safety complaints. It also detailed who had the responsibility and discretion for these matters, and set out a detailed grievance procedure which was to be the exclusive mechanism for handling employee complaints about violations of the CBA. Finally, the CBA established the standards and procedures for termination.

Since all of these provisions were the result of collective bargaining, enfor-

cement of the statutes by way of this wrongful discharge claim would interfere with the primacy of collective bargaining as the means for setting the terms of employment and could undercut the effectiveness of the grievance procedures. Consequently, the Court finds that federal labor law preempts and prohibits the maintenance of this public policy wrongful discharge action.

Due to the preemption of plaintiff's wrongful discharge claim, Lastimosa's sole recourse would be to bring a §301 suit for breach of the CBA. Since the CBA provides that the grievance and arbitration procedures are his sole remedy for breach, Lastimosa can only bring a §301 suit against Hughes if he also makes a claim that the union breached its duty of fair representation with respect to the handling of his

grievance. Since no such claim has been made against the union, an action cannot be maintained against Hughes. Thus, summary judgment in favor of defendants is appropriate.

DATED: April 16, 1986

STEPHEN V. WILSON
United States District
Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CATALINO LASTIMOSA,	)	
	)	
Plaintiff-Appellant,	)	FILED
	)	
vs.	)	Nov. 13, 1967
	)	
HUGHES AIRCRAFT COMPANY, JACK CURTIS,	)	Clerk, U.S. District Ct.
	)	
Defendants-Appellees	)	

No. 86-5899
CV 85-2780 RG

APPEAL from the United States District Court for the _____ District of _____.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of said District Court in this Cause, be, and hereby is

AFFIRMED.

A TRUE COPY
ATTEST

Cathy A. Catterson

Clerk of Court

By: _____
Deputy Clerk

Filed and entered July 22, 1987

APPENDIX B

§6300. **PURPOSE**

The California Occupational Safety and Health Act of 1973 is hereby enacted for the purpose of assuring safe and healthful working conditions for all California working men and women by authorizing the enforcement of effective standards, assisting and encouraging employers to maintain safe and healthful working conditions, and by providing for research, information, education, training and enforcement in the field of occupational safety and health.

§6310. **RETALIATION FOR FILING COMPLAINT PROHIBITED; OFFENSES**

(a) No person shall discharge or in any manner discriminate against any employee because such employee has * * * either (1) made any oral or written complaint to the division, other govern-

mental agencies having statutory responsibility for or assisting the division with reference to employee safety or health, his employer, or his representative, or (2) instituted or caused to be instituted any proceeding under or relating to his rights or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any rights afforded him.

(b) Any employee who is discharged, threatened with discharge, demoted, suspended, or in any other manner discriminated against in the terms and conditions of such employment by his employer because such employee has made a bona fide oral or written complaint to the division, other governmental agencies having statutory responsibility for or assisting the division with reference to

employee safety or health, his employer, or his representative, of unsafe working conditions, or work practices, in his employment or place of employment shall be entitled to reinstatement and reimbursement for lost wages and work benefits caused by such acts of the employer. Any employer who willfully refuses to rehire, promote, or otherwise restore an employee or former employee who has been determined to be eligible for such rehiring or promotion by a grievance procedure, arbitration, or hearing authorized by law, is guilty of a misdemeanor.

§6311. **RETALIATION FOR REFUSAL TO WORK IN VIOLATION OF HEALTH AND SAFETY STANDARDS; ACTION FOR WAGES**

No employee shall be laid off or discharged for refusing to perform work in the performance of which this code,

including Section 6400, any occupational safety or health standard or any safety order of the division or standards board will be violated, where the violation would create a real and apparent hazard to the employee or his or her fellow employees. Any employee who is laid off or discharged in violation of this section or is otherwise not paid because he or she refused to perform work in the performance of which this code, any occupational safety or health standard or any safety order of the division or standards board will be violated and where the violation would create a real and apparent hazard to the employee or his or her fellow employees shall have a right of action for wages for the time the employee is without work as a result of the layoff or discharge * * *.

§6400. **SAFE AND HEALTHFUL EMPLOYMENT AND PLACE OF EMPLOYMENT.**

Every employer shall furnish employment and a place of employment which are safe and healthful for the employees therein.

§6401. **DUTY TO FURNISH SAFETY DEVICES AND ADOPT SAFE PRACTICES AND PROCEDURES**

Every employer shall furnish and use safety devices and safeguards, and shall adopt and use practices, means, methods, operations, and processes which are reasonably adequate to render such employment and place of employment safe and healthful. Every employer shall do every other thing reasonably necessary to protect the lift, safety, and health of employees.

§6403. **FAILURE TO FURNISH SAFETY DEVICES OR ADOPT SAFE PRACTICES AND PROCEDURES**

No employer shall fail or neglect to do any of the following:

(a) To provide and use safety devices and safeguards resaonably adequate to render the employment and place of employment safe.

(b) To adopt and use methods and processes reasonably adequate to render the employment and place of employment safe.

(c) To do every other thing reasonably necessary to protect the life, safety, and health of employees.

§6404. **OCCUPANCY OR MAINTENANCE OF UNSAFE OR UNHEALTHFUL PLACE OF EMPLOYMENT**

No employer shall occupy or maintain any place of employment that is not safe

and healthful.

§6406. **UNLAWFUL ACTS**

No person shall do any of the following:

(a) Remove, displace, damage, destroy or carry off any safety device, safeguard, notice, or warning, furnished for use in any employment or place of employment.

(b) Interfere in any way with the use thereof by any other person.

(c) Interfere with the use of any method or process adopted for the protection of any employee, including himself, in such employment, or place of employment.

(d) Fail or neglect to do every other thing reasonably necessary to protect the life, safety, and health of employees.

§6407. **COMPLIANCE WITH STANDARDS, REGULATIONS, ETC.**

Every employer and every employee shall comply with occupational safety and health standards, with Section 25910 of the Health and Safety Codes, and with all rules, regulations, and orders pursuant to this division which are applicable to his own actions and conduct.

§6407. COMPLIANCE WITH STANDARDS, REGULATIONS, ETC.

Every employer and every employee shall comply with occupational safety and health standards, with Section 25910 of the Health and Safety Codes, and with all rules, regulations, and orders pursuant to this division which are applicable to his own actions and conduct.

Supreme Court, U.S.
FILED
FEB 26 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1263

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CATALINO LASTIMOSA,
Petitioner,

vs.

HUGHES AIRCRAFT COMPANY
AND JACK CURTIS,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

*PETER H. BENZIAN
DEANNE P. GEORGE
KRISTINE P. NESTHUS
LATHAM & WATKINS
Suite 2100
701 "B" Street
San Diego, California 92101
(619) 236-1234
Attorneys for Respondents

*Counsel of Record

Lawyers Brief Service / Legal Publishers / (213) 383-4457 / (714) 720-1510

QUESTIONS PRESENTED

1. Did the court below err in affirming the district court's judgment for respondents on the ground that petitioner's wrongful discharge claim under state law was essentially a claim that he was discharged in violation of a collective bargaining agreement, and thus was preempted by Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, where petitioner claimed he was discharged in violation of safety provisions contained in a collective bargaining agreement?

2. Did the court below err in holding that the district court need not imply an amendment of petitioner's complaint to allege an essential element of a claim under federal law, where petitioner represented to the district court that he made no such allegation and did not seek leave to amend in the district court?

RULE 28.1 LISTING

Parties to the proceedings below were: plaintiff-appellant Catalino Lastimosa and defendants-appellees Hughes Aircraft Company ("HAC") and John Curtis. The parent company of HAC is GM Hughes Electronics Corporation, a wholly-owned subsidiary of General Motors Corporation. HAC's subsidiaries (except wholly-owned subsidiaries) and affiliates presently include ACCSO S. A.; Alliance Development Corporation; Atlantic Satellites Ltd.; ELEKLUFT Elektronik-und Luftfahrtgerate GmbH; ELTRO GmbH; HBH Services Corporation; Japan Communications Satellite Company, Inc.; Japan Satellite Communications Network Corporation L-T Ranches, Inc.; Nippon Avionics Co., Ltd.; and UKADGE Systems Limited. HAC also has an interest in the following joint venture partnerships: AMRAAM International Licensing Company; Earth Observation Satellite Company; HBH Company, a Joint Venture of Hughes Aircraft Company, The Bendix Corporation and Holmes & Narver, Inc.; HKV, a Joint Venture of International Electronics Systems, Inc. and A/S Kongsberg Vaapenfrabrikk; Hughes Information Systems, a Partnership of International Electronics Systems, Inc. and Hughes Systems Management International; MET, a Joint Venture of Hughes Aircraft Company and Texas Instruments Incorporated; Project 436 Joint Ventures (two classified joint ventures); T.A.D. Communications Company, a Joint Venture of Hughes Aircraft Company and the International Telephone and Telegraph Corporation; T.A.D. Communications Company International, a Joint Venture of International Electronics Systems, Inc.; AVCRON; and Western Alliance Air Defense.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

RULE 28.1 LISTING ii

TABLE OF AUTHORITIES vi

OPINION AND JUDGMENT BELOW 1

STATUTES AND RULES INVOLVED 2

I. STATEMENT OF THE CASE 2

A. FACTUAL BACKGROUND 3

B. PROCEDURAL BACKGROUND 6

II. REASONS REVIEW SHOULD BE DENIED 11

A. LASTIMOSA'S CLAIM UNDER STATE LAW IS PREEMPTED BY SECTION 301 BECAUSE IT IS ESSENTIALLY A CLAIM FOR BREACH OF THE COLLECTIVE BARGAINING AGREEMENT 11

1. The Ninth Circuit's Decision in This Action Does Not Conflict With The Decisions of This Court. 11

Page

a. The Decision Does Not Conflict With *Caterpillar* 11

b. The Decision in This Action is Consistent With *Allis-Chalmers* 14

c. State Law Supports the Decision in This Action 16

d. The Other Authorities Cited by Lastimosa Are Inapposite 18

2. The Ninth Circuit's Decision in This Action Does Not Conflict With Other Decisions of the Circuit 20

B. THE COURT OF APPEALS DID NOT ERR IN REFUSING TO IMPLY AN AMENDMENT OF LASTIMOSA'S COMPLAINT 24

III. CONCLUSION 26

INDEX TO APPENDIX

Page

APPENDIX A

29 U.S.C. § 185
Section 301, Labor Management Relations Act A-1

29 U.S.C. § 157
Section 7, National Labor Relations Act. A-1

29 U.S.C. § 158
Section 8, National Labor Relations Act A-2

Federal Rule of Civil Procedure 15 ..... A-2

APPENDIX B

Excerpts from Deposition of Catalino Lastimosa. B-1

TABLE OF AUTHORITIES

Page

Cases

Allis-Chalmers Corp. v. Lueck,
471 U.S. 202 (1985) 14, 15, 18

Bale v. General Telephone Co. of Calif.,
795 F.2d 775 (9th Cir. 1985) 23

Buscemi v. McDonnell Douglas Corp.,
736 F.2d 1348 (9th Cir. 1984) 8

Caterpillar, Inc. v. Williams,
482 U.S. ___, 107 S.Ct. 2425 (1987) 11-14

Davis v. United States,
417 U.S. 333 (1974) 20

De Soto v. Yellow Freight Systems, Inc.,
811 F.2d 1333 (9th Cir. 1987) 22-24

Friday v. Hughes Aircraft Co.,
188 Cal.App.3d 117,
225 Cal. Rptr. 89 (1986) 17, 22

Garibaldi v. Lucky Food Stores, Inc.,
726 F.2d 1367 (9th Cir. 1984), *cert. den.*,
471 U.S. 1099 (1985) 21-23

Internat'l Brotherhood of Electrical Workers v. Hechler,
107 S.Ct. 2161 (1987) 15

Page

Jim Causley Pontiac v. NLRB,
620 F.2d 122 (6th Cir. 1980) 8

Lingle v. Norge Div. of Magic Chef, Inc.,
823 F.2d 1031 (7th Cir. 1987), *cert. granted*, 108 S.Ct. 226 (1987) 19

NLRB v. City Disposal Systems, Inc.,
465 U.S. 822 (1984) 8

Oglesby v. RCA Corp.,
752 F.2d 272 (7th Cir. 1985) 22

Olguin v. Inspiration Consolidated Copper Co.,
740 F.2d 1468 (9th Cir. 1984) 19, 22, 23

Paige v. Henry J. Kaiser Co.,
826 F.2d 857 (9th Cir. 1987) 11, 20-22, 24

San Diego Building Trades Council v. Garmon,
359 U.S. 236 (1959) 8, 18

Schroeder v. Trans World Airlines,
702 F.2d 189 (9th Cir. 1983) 23

United Air Lines, Inc. v. Occupational Safety and Health Appeals Board,
32 Cal.3d 762, 187 Cal. Rptr. 387,
654 P.2d 157 (1982) 18, 19

Vaca v. Sipes,
386 U.S. 171 (1967) 18, 25

Page

Young v. Anthony's Fish Grottos, Inc.,
830 F.2d 993 (9th Cir. 1987) 22

Statutes

Federal

29 U.S.C. § 185(a), Section 301 of the
Labor Management Relations Act..... *passim*

29 U.S.C. § 157, Section 7 of the
National Labor Relations Act 2, 8

29 U.S.C. § 158(a)(1), Section 8 of the
National Labor Relations Act 2, 8

State

California Labor Code
§§ 6300, *et seq.* 2
§ 6400 16
§ 6310 16

Rules

Federal Rule of Civil Procedure 15(a) 2, 25

United States Supreme Court Rule 17 26

No. 87-1263

IN THE

Supreme Court of the United States

October Term, 1987

CATALINO LASTIMOSA,
Petitioner,
vs.

HUGHES AIRCRAFT COMPANY
AND JACK CURTIS,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Hughes Aircraft Company ("HAC") and Jack Curtis (collectively the "respondents") respectfully request that this Court deny the petition of Catalino Lastimosa ("Lastimosa") for a writ of certiorari, seeking review of the decision and opinion of the United States Court of Appeals for the Ninth Circuit filed in this proceeding on October 30, 1987.

OPINION AND JUDGMENT BELOW

The original opinion (an unpublished memorandum decision) and judgment of the Court of Appeals, the order amending such opinion and denying petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc (the "Petition for Rehearing"), and the findings of fact and conclusions of law of the United States District Court for

the Central District of California are reproduced in the Appendix to Lastimosa's Petition for Writ of Certiorari (the "Petition"), and are therefore not reproduced herein.

STATUTES AND RULES INVOLVED

Pertinent portions of the California Occupational Health and Safety Act, California Labor Code §§ 6300, *et seq.* are reproduced in the Appendix to the Petition and are therefore not reproduced herein. The pertinent portions of Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a), Sections 7 and 8 of the National Labor Relations Act, 29 U.S.C. §§ 157 and 158, and Rule 15 (a) of the Federal Rules of Civil Procedure are set forth in Appendix A hereto.

I

STATEMENT OF THE CASE[1]

As the question before this Court is whether this action raises any issues which merit the Court's review, respondents will not attempt to state here all of the facts relevant to this action. However, the following factual statement is necessary to consider the issue now before the Court.

---

[1] The facts set forth herein are supported by documentary evidence, deposition testimony, and declarations presented to the district court in connection with respondents' motion for summary judgment in this action. Lastimosa presented no evidence in the district court which contradicted that presented by respondents.

A. FACTUAL BACKGROUND

Lastimosa was employed by HAC from June 1978 until June 1984. At all relevant-times, HAC was engaged in the business of, among other things, manufacturing delicate electronic circuits used in products such as travelling wave tubes. At the time of his discharge, Lastimosa worked as a furnace operator in what is known in the electronics industry as a Class 100,000 clean room. The air in a Class 100,000 clean room is specially filtered to be roughly 10 times cleaner than the outside air. HAC maintained the furnace room in this manner because the furnaces were used to braze electronic circuits, which are particularly susceptible to contamination from dust and other particulates. In addition to filtering the air, HAC required furnace room employees to wear special clothing and prohibited smoking in the room. Access to the room was gained through an air lock, and daily "wet downs" and cleanings of the furnace room were also performed. One wall of the furnace room included several large glass windows, and HAC customers occasionally passed by these windows on tours of the facility or on business visits. HAC marketed its products in part by indicating the clean conditions under which these delicate electronic circuits were processed, including the clean room status of its furnace room operation.

Lastimosa claims in his Petition that the external surfaces of the furnaces were "wrapped in asbestos." The evidence before the courts below showed that actually, some of the surfaces of five of eleven furnaces in the furnace room were wrapped in a "sleeve" composed of transite, which is a hard, cement-like compound, partially composed of asbestos. The transite served as a heat shield. Furnace operators did not come in contact with the transite while operating the furnaces, no moving parts were made of this

asbestos material, and the transite was never used as a working surface. Lastimosa also asserts that in June 1984, HAC "began replacing the asbestos on the furnace with new asbestos, thereby increasing the risk of asbestos exposure." This statement presumably refers to the fact that at one time, certain furnaces used asbestos gaskets, which were replaced on occasion. HAC presented undisputed evidence that the use of asbestos gaskets in the furnaces was discontinued at least 18 months prior to Lastimosa's termination, and that in any event, the furnaces were always removed from the furnace room when the gaskets were replaced.

Throughout his employment at HAC, Lastimosa was a member of a labor organization, the Electronic and Space Technicians, Local 1553 of the AFL-CIO (the "Union"), which was the exclusive collective bargaining representative of Lastimosa and certain other HAC employees. At all times relevant to the issues herein, there was a written collective bargaining agreement in effect between HAC and the Union (the "CBA"), which governed Lastimosa's wages, hours and working conditions.

Article XXI of the CBA dealt with safety in the workplace. HAC agreed in this Article to conduct safety inspections, provide safety devices, and take other specific steps to maintain "high standards of safety." One of HAC's specific obligations under this Article was:

> [T]o provide modern and appropriate safety devices and protective equipment to safeguard and protect its employees; and, the use of such safety devices and protective equipment, when furnished, shall be mandatory.

Article XXI also stated that:

> An employee, or the employee's Department Steward who believes that a job assignment is

> unsafe, shall report such conditions to the immediate Supervisor who will institute an investigation immediately.

Article II of the CBA provided that employees could be discharged "for cause," and that HAC had the right to establish work procedures and methods. The CBA also provided a final and binding grievance and arbitration procedure for settling disputes between an employee and HAC, including disputes over an employee's rights under the CBA. Lastimosa had received a copy of the CBA and had utilized its grievance procedure on many occasions.

In 1984, Lastimosa complained to HAC about what he thought was a safety hazard in his workplace: he claimed that there were asbestos particles in the furnace room air. At Lastimosa's request, HAC provided him with protective paper dust masks to wear pending an investigation of his complaint. Lastimosa also made an anonymous complaint to the State of California's Occupational Safety and Health Administration ("Cal-OSHA"), which conducted a surprise inspection of HAC's facility for the purpose of determining whether there was any asbestos exposure danger. The inspection conducted by Cal-OSHA resulted in no citation or violations to HAC, and showed no safety hazard or asbestos detected in Lastimosa's workplace. In fact, Cal-OSHA determined that levels of asbestos in the furnace room were lower than what Lastimosa encountered in the air outside the building, and so advised Lastimosa.

The results of the 1984 Cal-OSHA inspection were consistent with a prior inspection by the same agency, and earlier testing conducted by HAC. In 1983, Cal-OSHA had made a surprise inspection of the same furnace room in response to an anonymous complaint, and had found no violation of safety regulations. Moreover, HAC conducted air sampling tests in the furnace room in 1980 and 1982. A certified, independent laboratory reported to HAC on both

occasions that no asbestos within detectable limits was found in the air samples collected.

Following Cal-OSHA's 1984 inspection, Lastimosa was advised about the results of the inspection and told that he would no longer be permitted to wear a dust mask. HAC took the position that there was no asbestos hazard, as borne out by the inspections and testings; that Lastimosa had not presented any medical documentation to indicate he was suffering from asbestos exposure or that he was unable to work in the furnace room; and that continued wearing of a dust mask was detrimental to HAC's ability to ensure the integrity of its clean room to customers. Lastimosa then filed a written grievance under the CBA, stating that he should be allowed to wear a dust mask. In its response, HAC stood by its position that Lastimosa would not be allowed to wear a dust mask.

Subsequently, Lastimosa began wearing a dust mask again. When Lastimosa refused to remove the mask after being reminded of the Cal-OSHA test results, he was suspended pending further notice. He then received a telegram from HAC in which he was given one last chance to report to work without a dust mask, or submit medical documentation of the need to wear one; he was also advised that if he failed to do so he would be discharged. Lastimosa then met with supervision and Union representatives. At this meeting, Lastimosa maintained that he would not work without a dust mask and did not submit any medical documentation. HAC therefore discharged Lastimosa at the conclusion of the meeting.

B. PROCEDURAL BACKGROUND

Lastimosa challenged his discharge through the CBA's grievance process and by filing unfair labor practice charges against HAC and the Union with the National Labor

Relations Board ("NLRB"). In both forums, he claimed that he was discharged for wearing the dust mask, and that his discharge violated Article XXI of the CBA, which stated that the use of safety devices, when provided by HAC, was "mandatory." The Union's Executive Committee reviewed his grievance and concluded that it lacked sufficient merit to place it into formal arbitration. The NLRB dismissed Lastimosa's charges and denied his subsequent appeal for lack of sufficient evidence to establish that he was discharged for any reason other than failure to comply with instructions.

Lastimosa then filed this action in the California Superior Court for the County of Los Angeles, alleging a single cause of action for "wrongful discharge." The Complaint referred to "company rules" which Lastimosa claimed were violated by HAC and which, he alleged, entitled him to use the dust masks; Lastimosa testified in his deposition that the "rules" referred to Article XXI of the CBA. Lastimosa further testified that he was discharged in violation of the CBA for wearing a safety mask whose use was, according to his interpretation of Article XXI, mandatory. Lastimosa disclaimed in his deposition the argument that he was discharged in retaliation for filing a complaint with Cal-OSHA and indeed, his complaint to the agency was made anonymously. The following quotes dramatically illustrate the inconsistency between Lastimosa's argument and the undisputed facts (emphasis has been added). Additional deposition excerpts showing the nature of Lastimosa's claim are set forth in Appendix B hereto.

Q. . . . Have you told me all the information you have upon which you're basing your claim that you were fired from Hughes for reporting them to Cal-OSHA about asbestos?

A. *I never claimed I was fired for reporting it to Cal-OSHA. I — I was fired for wearing a safety mask.*

* * *

Q. Did you call [the Carpenters' Union] to complain about asbestos at Hughes?

A. *No. I called to complain that I was terminated for wearing a safety mask because of the asbestos exposure.*

HAC removed the Complaint to federal district court on the ground that Lastimosa's alleged state law claim was preempted by federal labor law. HAC then moved for summary judgment on the grounds that federal labor law preempted Lastimosa's alleged state law claim, or alternatively, because Lastimosa's claim was preempted by the National Labor Relations Act (the "NLRA") and within the exclusive jurisdiction of the NLRB. 29 U.S.C. §§ 157, 158(a)(1).[2]

---

[2] This second ground, based on the NLRA, was not addressed by either the district court or the Ninth Circuit in their decisions, and Lastimosa has not raised the issue in his Petition. Respondents contend that NLRA preemption provides a separate, independent ground for the decision of the Ninth Circuit. Lastimosa's allegations amount to protected activity under Section 7 of the NLRA, because he was invoking a right arising under the CBA. Further, Lastimosa alleged in his NLRB proceedings that HAC and his Union committed unfair labor practices under Section 8 of the NLRA. Controversies under Sections 7 and 8 are subject to the exclusive jurisdiction of the NLRB, and state claims based on the same activity are preempted. *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 245 (1959)(states must defer to the exclusive competence of the NLRB); *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822 (1984)(employee acting alone may engage in protected activity). *See also Jim Causley Pontiac v. NLRB*, 620 F.2d 122 (6th Cir. 1980) (employee claiming layoff in retaliation for filing safety complaints with Michigan Occupational Safety and Health Administration held to be engaged in protected activity under Section 7); *Buscemi v. McDonnell Douglas Corp.*, 736 F.2d 1348 (9th Cir. 1984) (employee's wrongful discharge claim properly removed and dismissed based on NLRA preemption where plaintiff claimed retaliation for voicing complaints about employer practices).

The district court granted summary judgment to respondents, holding that "[d]eposition testimony makes clear that plaintiff's claim in reality is essentially that he was discharged in violation of the provisions of the CBA pertaining to safety and discharge." (Petition, Appendix A at A-13.) Thus, Lastimosa's claim was preempted by Section 301 of the Labor Management Relations Act (the "LMRA"), 29 U.S.C. § 185. The court further held that even if Lastimosa's state law claim was recharacterized as a claim for breach of the CBA under Section 301, it failed as a matter of law because the grievance and arbitration procedures set forth in the CBA were final and binding on Lastimosa, absent any allegation that the Union had breached its duty of fair representation in processing Lastimosa's grievance. (Petition, Appendix A at A-19 to A-20.)

Lastimosa appealed the district court's decision to the Ninth Circuit Court of Appeals. Lastimosa continued to argue that his claim for wrongful discharge was not preempted, and, for the first time, argued that if his state claim was preempted the district court had improperly denied him the opportunity to amend his Complaint to plead that the Union had breached its duty of fair representation.

The Ninth Circuit affirmed the decision of the district court in a memorandum decision, concluding that the action had been properly removed and subsequently dismissed by the trial court. The Ninth Circuit held that the district court properly applied the artful pleading doctrine to determine that Lastimosa was asserting a claim grounded in the safety provisions of the CBA, even though his claim was framed as a state law tort and contract action. The

Ninth Circuit concluded that Lastimosa's rights in his state wrongful discharge action would "substantially depend on analysis of the terms" of the CBA. (Petition, Appendix A at A-3 to A-4.)

The Ninth Circuit further reasoned that the state statutes relied upon by Lastimosa were directed not at the general public, but at employers and the employment relationship, and that the CBA provided no less protection to Lastimosa than did these state statutes. The Ninth Circuit finally concluded that federal labor policies favoring uniform interpretation of collective bargaining agreements and exclusivity of union-employer procedures mandated that Lastimosa not be allowed to pursue his state law claim. (Petition, Appendix A at A-4 to A-6.)

As to Lastimosa's proposed amendment to the Complaint, the Ninth Circuit held that the district court did not err by failing to imply an amendment to include an allegation of breach of the duty of fair representation, because Lastimosa had asserted in the district court that he was alleging no such breach. Furthermore, the Ninth Circuit concluded that Lastimosa had not raised the issue in the district court, and had not requested leave to amend his Complaint from such court at any time. (Petition, Appendix A at A-7.) Thereafter, Lastimosa filed his Petition for Rehearing with the Ninth Circuit, which was denied. (Petition, Appendix A at A-9.)

II

REASONS REVIEW SHOULD BE DENIED

A. LASTIMOSA'S CLAIM UNDER STATE LAW IS PREEMPTED BY SECTION 301 BECAUSE IT IS ESSENTIALLY A CLAIM FOR BREACH OF THE COLLECTIVE BARGAINING AGREEMENT

Lastimosa argues that certiorari should be granted in this action because the Ninth Circuit "refused to consider" the decision by this Court in *Caterpillar, Inc. v. Williams*, 482 U.S. ___, 107 S.Ct. 2425 (1987), another Ninth Circuit decision, *Paige v. Henry J. Kaiser Co.*, 826 F.2d 857 (9th Cir. 1987), and "other generally applicable principles of Federal Pre-emption." (Petition at i.) The Ninth Circuit not only considered, but properly applied, principles set out in this Court's decisions on Section 301 preemption, including this Court's decision in *Caterpillar*. Furthermore, the decision in this action is consistent with *Paige* and other Ninth Circuit decisions. Therefore, Lastimosa's Petition does not present any question suitable for this Court's review.

1. The Ninth Circuit's Decision in This Action Does Not Conflict With The Decisions of This Court

a. The Decision Does Not Conflict With *Caterpillar*

Lastimosa claims that the Ninth Circuit "refused to consider" *Caterpillar*. However, the Ninth Circuit's

decision in *Caterpillar* was fully discussed in the appellate briefs of the parties to this action (before this Court affirmed), and the Ninth Circuit cited this Court's decision in *Caterpillar* in its decision in this action. Clearly the Ninth Circuit *did* consider the principles set forth in *Caterpillar*, and did not act in conflict with such principles.

In *Caterpillar*, the plaintiffs claimed that while they were management employees, Caterpillar made certain promises to them concerning the length of their employment. The plaintiffs were later downgraded to hourly positions covered by a collective bargaining agreement, and then laid off from those positions. The plaintiffs filed an action in California state court claiming breach of the individual employment contracts. Caterpillar's removal of the action to federal court on the ground that any individual employment contracts were merged into and superseded by the collective bargaining agreement was upheld by the trial court. The Ninth Circuit reversed, holding that the plaintiffs' state-law claims were neither directly nor indirectly grounded upon rights created by the collective bargaining agreement, did not require interpretation or application of that agreement, and therefore did not arise under Section 301. This Court affirmed.

Generally, when federal preemption is raised as a defense to allegations in a pleading, removal is not justified. However, in *Caterpillar*, this Court recognized that claims brought by a plaintiff under state law may in reality be Section 301 claims which are completely preempted by federal law. Under the "complete preemption" doctrine, such claims may only be considered as federal claims arising under federal law, and are properly removable. 107 S.Ct. at 2430. That is, Section 301 governs claims founded on rights created by collective bargaining agreements, as well as claims "substantially dependent on analysis of a

collective bargaining agreement." *Id.* at 2431. As to such claims, Section 301 has complete preemptive effect.

> [W]hen "[t]he heart of the [state law] complaint [is] a . . . clause in the collective bargaining agreement," . . . that complaint arises under federal law:
>
> > "[T]he pre-emptive force of § 301 is so powerful as to displace entirely any state cause of action 'for violation of contracts between an employer and a labor organization.' Any such suit is purely a creature of federal law, notwithstanding the fact that state law would provide a cause of action in the absence of § 301."

Id. at 2430 (citations omitted).[3] Applying these principles to the facts in *Caterpillar*, this Court concluded that the plaintiffs' claims were not "completely preempted" Section 301 claims, because the plaintiffs were claiming rights under individual employment contracts, and not a collective bargaining agreement. *Id.* at 2431.

The facts of the present action are quite different. Lastimosa was, throughout his employment at HAC, a bargaining unit employee, and does not rely on any separate, individual contract as the source of his state law claim. Moreover, Lastimosa's wrongful discharge claim is firmly based on HAC's alleged breach of the CBA, and is entirely dependent upon analysis of the safety and discharge provisions thereof. Lastimosa consistently

---

[3] Lastimosa contends that under *Caterpillar* he is "master of his complaint," and may choose whether to bring his claim under state or federal law. However, this Court in *Caterpillar* recognized that such a choice exists *only* when preemption is raised as a defense to a state law claim which is not completely preempted. Lastimosa has invoked a right created by the CBA and asserted a claim which arises under federal law. He therefore cannot "choose" to bring a state law claim instead.

maintained, on the job, in his deposition testimony, and in his Union grievance and NLRB charges that he was asserting a right under Article XXI of the CBA to wear the dust mask and that he was discharged in violation of Articles XXI and II (the safety and discharge provisions) of the CBA. Although Lastimosa now attempts to argue that he is relying upon independent state rights, his own testimony and conduct show otherwise.

Finally, Lastimosa focuses on this Court's statement in *Caterpillar* that not every dispute concerning employment or "tangentially involving" the provisions of a collective bargaining agreement is preempted by Section 301. (Petition at 16.) This argument is without merit. Lastimosa's claim more than tangentially involves the CBA. It concerns matters of workplace safety, matters over which HAC and the Union specifically bargained during the collective bargaining process, and over which the parties reached agreement as set forth in the CBA. Moreover, the CBA's safety and discharge provisions can reasonably be read to prohibit retaliatory discharges of employees who make safety complaints. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, ___ , 105 S.Ct. 1904, 1913 (1985) ("The assumption that the labor contract creates no implied rights is not one that state law may make . . . . There is no reason to assume that the labor contract as interpreted by the arbitrator would not provide such relief.").

b. The Decision in This Action is Consistent With *Allis-Chalmers*

Lastimosa further argues that the rights against retaliatory discharge afforded him under Cal-OSHA are rights afforded every California employee which exist independent of the CBA, and thus his state action asserting such rights is not preempted. He also argues that his state

claim is an action in tort and thus separate from the CBA. (Petition at 17.) Both arguments fail under this Court's decision in *Allis-Chalmers Corp.*, 105 S.Ct. at 1904, a decision which Lastimosa fails to mention in his Petition. In *Allis-Chalmers*, a union employee brought a state law tort action against his employer for bad faith handling of an insurance claim. The claim had been made pursuant to an insurance plan contained in the collective bargaining agreement between the plaintiff's union and the employer. The Court held that federal labor law preempts not only state contract claims, but also state tort claims which "as applied, would frustrate the federal labor-contract scheme established in § 301." 105 S.Ct. at 1910. This Court held that the plaintiff's tort claim was preempted by federal labor law because the claim was "inextricably intertwined with consideration of the terms of the labor contract." 105 S.Ct. at 1912. *See also, Internat'l Brotherhood of Electrical Workers v. Hechler*, 107 S.Ct. 2161 (1987) (state law tort claim based on allegation that union failed to provide safe workplace preempted by Section 301 because claim not sufficiently independent of the collective bargaining agreement).

The Court emphasized in *Allis-Chalmers* that preemption was necessary to preserve "the central role of arbitration" in the collective bargaining system, expressing concern that plaintiffs could simply bypass arbitration by "re-labeling" a claim arising out of a labor contract as a tort claim. 105 S.Ct. at 1915.

> A rule that permitted an individual to sidestep available grievance procedures would cause arbitration to lose most of its effectiveness, . . . as well as eviscerate a central tenet of federal labor-contract law under § 301 that it is the arbitrator, not the court, who has the responsibility to interpret the labor contract in the first instance.

105 S.Ct. at 1916 (citation omitted).

In the present action, Lastimosa's state claim is inextricably intertwined with consideration of the terms of the CBA because it is derived from the CBA itself. The fact that Lastimosa has chosen to label his claim a tort claim, and has gone to considerable length to find some state statute which purportedly protects him, cannot alter this state of affairs.

c. State Law Supports the Decision in This Action

Lastimosa invokes state policies set forth in the California Labor Code. Section 6400 of that Code provides that "[e]very employer shall furnish employment and a place of employment which are safe and healthful for the employees therein." Labor Code § 6310 prohibits, *inter alia*, the discharge of an employee because such employee has made safety complaints. However, the language of Labor Code Section 6310 evinces a specific intent on the part of the state legislature *not* to prevent the operation of collective bargaining processes in connection with retaliation claims under the Labor Code. Section 6310 provides in pertinent part as follows:

> (b) . . . Any employer who willfully refuses to rehire, promote, or otherwise restore an employee or former employee *who has been determined to be eligible for such rehiring or promotion by a grievance procedure, arbitration,* or hearing authorized by law, is guilty of a misdemeanor.

(Emphasis added.) Thus, the state specifically envisioned that in the case of union employees, enforcement of the policy set forth in Section 6310 would come through the grievance and arbitration procedures contained in collective bargaining agreements. To hold that Lastimosa can invoke

those procedures and then ignore their binding effect by subsequently pursuing a state law wrongful discharge action would not only undermine a method of enforcement specifically recognized by the state statute in question, but would pose a significant threat to the collective bargaining process.

Moreover, the California Court of Appeals has held that where a collective bargaining agreement deals specifically with safety issues, state wrongful discharge claims based on state safety statutes are preempted. *Friday v. Hughes Aircraft Co.*, 188 Cal.App.3d 117, 225 Cal. Rptr. 89 (1986) (appeal to California Supreme Court dismissed and this opinion ordered published by Supreme Court). In *Friday*, an employee brought a state claim for wrongful termination, claiming that he was terminated for reporting violations of the hazardous waste provisions of the California Health and Safety Code to his employer. The plaintiff's employment was governed by a CBA which contained express safety provisions substantially similar to those in the present action, since the plaintiff was also employed by HAC and represented by the same union as Lastimosa. The California Court of Appeals held that plaintiff's state action was preempted by Section 301 despite the state's interest expressed in its Health and Safety statutes.

> We find the facts reported in Friday's declaration imply nothing more than complaints about the safety of his workplace, a subject expressly covered by article XXI of the collective bargaining agreement.
>
> . . .
>
> . . . allowing Friday's wrongful termination action to go forward would involve consideration of the terms of the labor contract and directly interfere

with federal regulation of disputes arising out of collective bargaining agreements.

188 Cal.App.3d at 124.

d. The Other Authorities Cited by Lastimosa Are Inapposite

Lastimosa vaguely refers in his Petition to "well established federal law concerning preemption" which the Ninth Circuit failed to consider in this action, but does not detail how the decision in the present action conflicts with such federal law. The two cases he cites in support of this argument — *Vaca v. Sipes*, 386 U.S. 171 (1967), and *United Air Lines, Inc. v. Occupational Safety and Health Appeals Board*, 32 Cal.3d 762, 187 Cal. Rptr. 387, 654 P.2d 157 (1982) — do not support his Petition.

Lastimosa misstates the holding in *Vaca*. This Court stated in *Vaca* that "this preemption doctrine, however, has never been rigidly applied to cases where it could not fairly be inferred that Congress intended exclusive jurisdiction to lie with the *NLRB*," *not* the federal courts as stated by Lastimosa. 386 U.S. at 179 (emphasis added). The preemption doctrine referred to was not Section 301 preemption, but preemption based on the exclusive jurisdiction of the NLRB under *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959). These two doctrines involve different considerations and tests; "*Garmon* and like cases have no application to § 301 suits." 386 U.S. at 184. *See also Allis-Chalmers*, 105 S.Ct. at 1913 n.9 (the balancing test applied in *Garmon* preemption cases is "irrelevant" to suits under Section 301, in which Congress has mandated that federal law should govern).

The California Supreme Court decision in *United Airlines* involved a jurisdictional conflict between Cal-OSHA and the Federal Aviation Administration (the

"FAA") over regulation of employee safety at an airport ground maintenance facility. The California Supreme Court rejected an argument by United that Cal-OSHA could not regulate airport employee safety because of jurisdictional limits set forth in the Federal Occupational Safety and Health Act ("Fed-OSHA"), reasoning that Fed-OSHA specifically provides an exception to federal preemption where a state has enacted a federally approved plan. The decision in *United Airlines* does not address the question of federal labor law preemption, nor does it address the question of federal preemption where the relevant federal statute (in the present case, Section 301) does *not* specifically provide for limited state regulation.[4]

---

[4] As a final note, respondents wish to refer to a Seventh Circuit case, not addressed in the Petition, in which certiorari has been granted by this Court. In *Lingle v. Norge Div. of Magic Chef, Inc.*, 823 F.2d 1031 (7th Cir. 1987), *cert. granted*, 108 S.Ct. 226 (1987), the Seventh Circuit held that state law retaliatory discharge claims are preempted where the plaintiff is subject to a collective bargaining agreement which regulates discharge. The court reasoned, as the Ninth Circuit did in *Olguin v. Inspiration Consolidated Copper Co.*, 740 F.2d 1468 (9th Cir. 1984), and other decisions, that these state claims require interpretation of the collective bargaining agreements' discharge provisions, that such agreements provide protection equal to that of state statutes and policies prohibiting retaliatory discharge, and that the interests of federal labor policy require that such state claims be preempted. In the present action, the undisputed facts available to the courts below are much more compelling than in *Lingle*, and make clear that Lastimosa's claim is *not* a claim that he was discharged in retaliation for exercising rights under a state statute. Instead, Lastimosa claims that he was discharged for asserting a right under the CBA, a claim completely preempted by Section 301.

2. The Ninth Circuit's Decision in This Action Does Not Conflict With Other Decisions of the Circuit

Lastimosa also seeks review by this Court based on the assertion that the Ninth Circuit's decision in this action conflicts with the decision of another Ninth Circuit panel in *Paige*. Although conflict *between* the federal courts of appeal is a consideration governing this Court's review (*see* Rule 17 of this Court), ordinarily an intracircuit conflict is not a sufficient basis for granting a writ of certiorari. *See Davis v. United States*, 417 U.S. 333, 340 (1974) (petition for certiorari denied in earlier proceeding where party claimed intra-circuit conflict). There is no reason in the present action to depart from that usual practice. A party's remedy for such conflict is to seek hearing en banc by the court of appeals, which court will presumably resolve any perceived inconsistencies. Lastimosa filed such a petition, and the Ninth Circuit in its responsive order declared that "no judge of [the Ninth Circuit] has requested a vote to rehear the matter en banc." (Petition, Appendix A at A-10.)

In any event, the decision here does not conflict with the Ninth Circuit's decision in *Paige*, and is consistent with other Ninth Circuit decisions on the issue of Section 301 preemption. In *Paige*, plaintiffs claimed that they were fired because they refused to refuel generators on a construction site in a way that they believed was unnecessarily and illegally hazardous. The plaintiffs based their action for wrongful discharge on Cal-OSHA provisions providing for regulation of safety on the job. Defendants removed the action to federal court. The district court held that the plaintiffs' wrongful discharge claims were in fact claims under Section 301 and dismissed them. The Ninth Circuit reversed.

The collective bargaining agreement in *Paige* did *not* contain specific provisions governing worker safety, but merely a statement requiring the employer to comply with all state and federal health and safety laws, including OSHA. Therefore, the Ninth Circuit found that the employees' claim was not "intertwined or substantially dependent upon consideration of the terms of the labor contract." 826 F.2d at 863. The Ninth Circuit further reasoned that because the employees were concerned about the potential for a serious explosion at the jobsite, the employer's alleged conduct jeopardized the safety of others on the site, and not just the plaintiffs' safety. The employees' conduct thus implicated California's interest in protecting its citizens, rather than its interest in regulating the employment relationship. *Id.*

The Court thus compared the facts in *Paige* to the facts in *Garibaldi v. Lucky Food Stores, Inc.*, 726 F.2d 1367 (9th Cir. 1984), *cert. den.*, 471 U.S. 1099 (1985). In *Garibaldi*, a truck driver subject to a collective bargaining agreement alleged that he was discharged because he refused to deliver a load of spoiled milk in violation of a state statute. As in *Paige*, the Court of Appeals concluded that a state law claim based on such conduct "pose[d] no significant threat to the collective bargaining process," and "further[ed] the state's interest in protecting the general public — an interest which transcend[ed] the employment relationship." 726 F.2d at 1375.

The facts in *Paige* and *Garibaldi* are distinguishable. In *Paige* and *Garibaldi*, the plaintiffs were not relying on rights specifically set forth in the collective bargaining agreement. In addition, the employers' conduct in *Paige* and *Garibaldi* threatened the general public, persons *beyond* the employee, and transcended the employment relationship between the companies and the plaintiffs. By contrast, Lastimosa claims that he had a right under the

CBA to wear a dust mask, and that he was wrongfully fired for insisting on this right. Contrary to the claims alleged in *Garibaldi* and *Paige*, the claim alleged by plaintiff encroaches upon the collective bargaining process because workplace safety and employee termination are expressly governed by the CBA, and Lastimosa specifically invoked those provisions.[5]

The Ninth Circuit's decision in this case is also consistent with and supported by its other decisions, particularly *Olguin v. Inspiration Consolidated Copper Co.*, 740 F.2d 1468 (9th Cir. 1984), and *De Soto v. Yellow Freight Systems, Inc.*, 811 F.2d 1333 (9th Cir. 1987). In *Olguin*, decided after *Garibaldi*, the plaintiff alleged that he was unjustly discharged in retaliation for safety complaints, in violation of federal policy set forth in mine safety statutes and general state policy. Olguin's allegations were very similar to those in Lastimosa's Complaint, except that Lastimosa did not refer to any federal policy. The Ninth Circuit held that the allegations in *Olguin* were insufficient to invoke any state policy. The Court also remarked that Olguin had already filed a complaint with the NLRB, just as Lastimosa did in this case, and with the federal mine safety agency. The Court held as follows: ". . . Olguin complained to both the NLRB and the FMHSA. He cannot *now* seek protection in state law, because he acted in behalf of no state law or policy." 740 F.2d at 1475 (emphasis

---

[5] *See also Friday*, 188 Cal.App.3d at 124 (state wrongful termination claim preempted where plaintiff did not rely on a statute for the protection of the general public, but instead "complained of what he perceived to be unsafe internal practices in the handling of chemicals"); *Young v. Anthony's Fish Grottos, Inc.*, 830 F.2d 993 (9th Cir. 1987) (*Garibaldi* applies only when the state policy is "independent of the employment relationship"); *Oglesby v. RCA Corp.*, 752 F. 2d 272 (7th Cir. 1985)(Section 301 preempted state claim of employee who alleged wrongful discharge motivated by his safety complaints).

added). *See also Bale v. General Telephone Co. of Calif.*, 795 F.2d 775 (9th Cir. 1985)(state tort claims of bargaining unit employees preempted where employees had sought intervention of their union in regard to their termination).

The Ninth Circuit further reasoned in *Olguin* that it was "apparent that the true nature of Olguin's wrongful discharge complaint concerns the terms and conditions of employment as they are set out in the collective bargaining agreement," so that his complaint was "in fact" a Section 301 suit. 740 F.2d at 1474-75. Finally, the Ninth Circuit found that federal law preempted state law because "[t]he [collective bargaining] agreement provides the same or greater protection of job security that state tort law seeks to provide for nonunionized employees." 740 F.2d at 1474. *Cf., Schroeder v. Trans World Airlines*, 702 F.2d 189, 191 (9th Cir. 1983)(state claims preempted by Railway Labor Act where dispute concerned "topics discussed in the collective bargaining agreement").

In *De Soto*, a truck driver was terminated when he refused to drive a trailer which he mistakenly believed lacked proper registration. The Ninth Circuit held that the plaintiff's state claim for wrongful discharge was preempted by Section 301. The Court declined to follow its holding in *Garibaldi*, reasoning:

> Unquestionably, DeSoto thought he was doing the right thing in refusing to take the trailer out. Unfortunately for him, he was mistaken. He was not acting in defense of a public policy of the State of California, but incorrectly asserting his own interpretation of the law. It is just this kind of dispute over what is the appropriate management response to difficult behavior by an employee that should be the subject of a grievance procedure. It is not the kind of case that should become either a federal case or a state tort action.

811 F.2d at 1336. As the Ninth Circuit stated in *Paige*, in distinguishing *DeSoto*:

> The fact that [the plaintiff in *DeSoto*] was mistaken as to the law was central to the court's decision; no such mistaken belief is alleged here. Furthermore, health and safety concerns were not present in the case. Any potential health and safety problems from driving a truck with an unregistered trailer were negated by the fact that the trailer did indeed have the proper permits.

826 F.2d at 863 n. 11.

In the present action, the undisputed facts show that Lastimosa's fear for his health was completely unfounded and unsubstantiated. Testing by a private laboratory and Cal-OSHA itself had indicated that there was no risk to Lastimosa, and there was no evidence that Lastimosa had a medical problem related to asbestos or dust exposure. Thus, as in *DeSoto*, Lastimosa's concerns were unfounded. In any event, Lastimosa was not acting in defense of the Cal-OSHA statutes, but as he specifically testified, he was asserting his mistaken interpretation of the CBA. Lastimosa's insistence on wearing a dust mask, despite evidence that it was unnecessary and in disregard of HAC's business interests, is the type of "difficult behavior by an employee" which should be and was settled by way of the CBA's grievance procedure.

B. THE COURT OF APPEALS DID NOT ERR IN REFUSING TO IMPLY AN AMENDMENT OF LASTIMOSA'S COMPLAINT

Lastimosa also seeks review of the decision of the Ninth Circuit that the district court did not err by failing to imply an amendment of the Complaint to include a claim of

breach of the duty of fair representation by his Union, a prerequisite to suit under Section 301. Lastimosa merely argues that the Ninth Circuit erred; his argument does not raise any important questions of law, nor does Lastimosa point to any conflict between the Ninth Circuit's decision and the decision of any other court.

Lastimosa argues that "neither the Court of Appeal nor the district court, gave any justifiable reason for not allowing [Lastimosa] to proceed" on his Section 301 claim, and that both courts thus abused their discretion under Federal Rule of Civil Procedure 15(a) to deny amendments to his Complaint. (Petition at 23-24.) Lastimosa's assertions are simply untrue. The district court properly held that "[s]ince the CBA provides that the grievance and arbitration procedures are his sole remedy for breach, Lastimosa can only bring a § 301 suit against Hughes if he also makes a claim that the union breached its duty of fair representation with respect to the handling of his grievance. Since no such claim has been made against the union, an action cannot be maintained against Hughes." (Petition, Appendix A at A-19 to A-20.) *Vaca*, 386 U.S. at 184. The district court never denied Lastimosa leave to amend because he never sought such leave.

When Lastimosa argued on appeal that the district court should have *sua sponte* "implied" the required allegation into his Complaint, the Court of Appeals disagreed and affirmed the district court, reasoning that Lastimosa had not raised the issue below and that "in the district court he asserted that 'no breach of the duty of fair representation is alleged.' " (Petition, Appendix A at A-7.) Thus, each court explained its decision on this issue, and acted within its discretion under Federal Rule of Civil Procedure 15(a).

III

CONCLUSION

Respondents respectfully submit that Lastimosa has wholly failed to sustain his burden of establishing under Rule 17 of this Court's rules that there are special and important reasons why review should be granted. The decision below is not in conflict with the decisions of this Court or other decisions of the Ninth Circuit. Given the clear evidence supporting the decision below, the Petition poses no important question of federal law which should be settled by this Court. For the foregoing reasons, respondents respectfully request that Lastimosa's petition for a writ of certiorari be denied.

DATED: February 26, 1988

Respectfully submitted,

*PETER H. BENZIAN
DEANNE P. GEORGE
KRISTINE P. NESTHUS

LATHAM & WATKINS

Attorneys for Respondents

*Counsel of Record

APPENDIX A

29 U.S.C. § 185
(in pertinent part)

§ 185. Suits by and against labor organizations

Venue, amount, and citizenship

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 157

§ 157. Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

29 U.S.C. § 158
(in pertinent part)

§ 158. Unfair labor practices

(a) It shall be an unfair practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

Federal Rule of Civil Procedure 15
(in pertinent part)

(a) **Amendments**. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be longer, unless the court otherwise orders.

APPENDIX B

Excerpts From Deposition of Catalino Lastimosa

Lastimosa: Okay. During this time when I showed my supervisor —

Respondents' Attorney: The brochures?

Lastimosa: Yeah — the document that I made copies of, *I also showed him a union contract*, on page 63, paragraph B, where it says, you know — I can't remember what it says, exactly, but I brought that to his attention.

Lastimosa's Attorney: I'll paraphrase it, if I can recall it. "If safety equipment is furnished, it must be worn."

Respondents' Attorney: Is that what you're referring to?

Lastimosa: Yes.

Respondents' Attorney:

Q. Something to that effect?

A. Yes.

Q. And you showed it to [your supervisor]?

A. Several times.

* * *

Q. Now, even after you had the meeting with your supervisor and your union and you were told you can't wear this mask any more, you insisted on wearing the mask; is that right?

A. That's correct, *according to the union contract.*

Q. And June 22nd, you were suspended because you didn't want to work without the mask; is that right?

A. That's correct.

* * *

Q. And then Mr. Carillo, I gather, suspended you that day because you would not take off the mask; is that right?

A. Yes.

Q. And what did you and he say at that time?

A. I don't understand.

Q. I take it you had a conversation with Mr. Carillo. And just relate to me what you and he said at that time, the day you were suspended.

A. He says, "I warned you about wearing the safety mask." And I said, "This is a hazardous area. *The union contract states that I am allowed to wear it, if it was given to me.*"

* * *

Q. So what was said to you in this meeting on June 28th?

A. I can't remember exactly what was said.

Q. Can you remember, in general, what was said?

A. Generally, they told me to go to work in there, without the safety mask. *And I told them* the safety mask was given to me by the safety officer, and *according to the union contract, it's mandatory that I wear it.* And I'm wearing it for my own protection. It's not affecting my job in any way.

* * *

Q. After that, you filed charges with the NLRB against the company and the union; is that right?

A. That's correct.

Q. And those were initially dismissed by the NLRB for insufficient evidence?

A. That's correct.

Q. And against the company, *your complaint was that you'd been unfairly fired and the company wasn't complying with the union contract about the safety thing*?

A. *Yes, because the union contract states that I should be able to wear the mask.*

* * *

Q. Let me just show this to you, and we'll mark this Exhibit 17. Is that a copy of the appeal you sent to the NLRB?

Lastimosa: Yes.

Respondents' Attorney:

Q. *Now, you attached a page from the union contract to this; right?* Is this what you were referring to earlier? [Referring to Article XXI of the CBA.]

A. *Yes.*

Q. And you were talking about Section A, number 1b there?

A. Yes.

Q. And your appeal was also dismissed by the NLRB; is that right?

A. That's correct.

Q. *Now when you say, in there, you were following union policy, you're talking about this specific part of the union contract that's attached?*

A. *Yes.* [Referring to Article XXI of the CBA.]